

FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 92M-590
02885

In re Applications of
RECEIVED BY
JEFFREY SCOTT

EICHER COMMUNICATIONS, INC.

For Construction Permit for a
New FM Station on Channel 278A
in Bethany Beach, Delaware

) MM DOCKET NO. 92-106
)
) File No. BPH-910213ME
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) File No. BPH-910213MF
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PREHEARING CONFERENCE ORDER

Issued: May 20, 1992;

Released: May 22, 1992

1. The pre-hearing discovery in this proceeding is governed by the Commission's new hearing procedures. See Proposals To Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases (Gen. Doc. 90-264), 6 F.C.C. Rcd 157 (1990). Counsel and parties appearing pro se are conclusively presumed to have full knowledge of the new procedures.

2. The prehearing conference set for **July 14, 1992, at 9:00 a.m.** shall address the possibility for settlement and the Presiding Judge shall rule on any pending discovery issues and any procedural, discovery, or trial preparation matter raised by a party.¹ Formal on-the-record Admissions Session is set **September 22, 1992, at 9:30 a.m.** to receive previously exchanged hearing exhibits into evidence and to rule on the scope of witnesses for cross-examination. A hearing is set for **September 29, 1992, to commence at 10:00 a.m.** All conferences, admission sessions and hearings shall be conducted in a Commission courtroom in Washington, D.C.

General Instructions

3. Document requests and deposition notices shall be in the form of pleadings which are to be filed and served in accordance with the Commission's rules. 47 C.F.R. §§1.204-1.211. There shall be no requests or notices by letter correspondence. If the parties agree to a procedure, the agreed procedure must be filed as a Stipulation. In computing time, exclude the

¹ Settlement is to be fully explored by the parties at a meeting to be held before the first prehearing conference. A written report of that settlement meeting, the status of discovery, preliminary schedule of depositions to be taken, agreement reached on joint engineering evidence, and a preliminary comparative assessment of the parties' respective integration proposals under the HHI, shall be filed and submitted to the Presiding Judge on July 9, 1992.

first day on which an action is required or an event occurs. Where the day to act or plead falls on a holiday or weekend, use the next business day. Counsel and pro se parties are encouraged to agree among themselves on a uniform method and schedule for the most timely delivery of pleadings and production of documents.

Standardized Discovery

4. All parties who have timely filed their Notices of Appearance ("NOA") under 47 C.F.R. §1.221 shall, within five days of filing and service of their NOAs, effect the Standard Document Production ("SDP")² under 47 C.F.R. §1.325(c)(1), and shall exchange Standard Integration Statements ("SIS") under 47 C.F.R. §1.325(c)(2). Service of SDP and SIS are to be made only on parties that have timely filed an NOA. It is noted that SDP discovery utilizes a document request procedure similar to Rule 34 FRCP and thus for SDP discovery there is no motion filed and there is no requirement to show good cause. See revised 47 C.F.R. §1.325.

5. Initial supplemental requests for documents must be filed and served by the tenth day after the standardized exchange. Further supplemental motions for documents must be filed and served ten days after receipt of information on which the further supplemental demand is made. There is no requirement for a showing of good cause and the parties are encouraged to stipulate to the scope and terms of all supplemental document requests which would avoid the need for a motion. See new 47 C.F.R. §1.325(a). Party applicants are to seek by motion to compel only those documents that are refused to be produced, or that are contested as privileged. 47 C.F.R. §1.325(a)(2). Where documents that are responsive to a document request are on file with the Commission, such documents need only be identified by a responding party. Although copies of such documents need not be furnished, parties are encouraged to furnish copies if the request is reasonable.

Privileged Documents

6. Only documents need be produced on discovery which are not subject to the attorney-client privilege or the work-product exemption. Both types of documents are referred to as "privileged documents." Along with a party's document production there must be furnished a simultaneous list of any documents for which a privilege will be asserted.³ Documents in that

² If the designation order contains an air hazard issue against an applicant, that applicant shall provide in addition to the standardized exchange documents, copies of all communications passing between the applicant and the FAA relating to the site and the air hazard issue.

³ Parties are urged to waive privileges to the maximum extent possible. It is common knowledge that communications counsel are generally actively involved at early stages of financing, site selection and application preparation. See Opal Chadwell, 103 F.C.C. 2d 840, 846 (Review Bd 1988) (Board takes note that the "regular business" of communications attorneys is the preparation and prosecution of Commission applications). Thus, parties are urged to

list shall be described by date, sender, receiver, persons noted for copies ("cc"), and a brief description of subject matter. The list shall be accompanied with a statement of the precise basis for the privilege(s) asserted that relies upon cited and analyzed points and authorities. See Tri-State Community Development and Communications Corp., 4 F.C.C. Rcd 2402 (Review Bd 1989); and LNJ Communications, 3 F.C.C. Rcd 2745 and 4411 (Review Bd 1988). Opposing applicants have five(5) business days from receipt of the privilege claims within which to file a motion to compel production of the documents. Oppositions shall be filed and served in 4 days. 47 C.F.R. §1.294(b). Uncontested privilege claims which are not facially defective will be accepted by the Presiding Judge without a ruling. Documents containing materials which are claimed only in part to be privileged must be produced initially with only the claimed privileged matters masked. The assertion and contesting of privilege of the excised matter shall apply only to those excised portions of the document.

Depositions

7. There is no longer a requirement for 21 days' notice for principals' depositions. Such depositions of active and passive principals shall be noticed by the tenth day after exchange of SDP documents. Unless otherwise agreed, the parties shall take depositions in the city of license or in Washington, D.C. The parties must seek diligently to agree on the place, dates and times for taking depositions, at the lowest cost and the least inconvenience. If all parties concur, limited partners and non-voting shareholders may be deposed initially via telephone. 47 C.F.R. §1.318(c). Subsequent in person depositions of such witnesses may be sought by motion upon a showing of good cause. Depositions of non-party witnesses still require 21 days' notice under the prescribed time for completing discovery. Therefore, parties seeking non-party deposition discovery within the authorized discovery period should submit ex parte subpoena requests immediately on the passage of time for oppositions, or immediately following a ruling that denies any opposition, and a request should be submitted to expand discovery for that purpose beyond the prescribed 30 days. See 47 C.F.R. §§1.315, 1.333 and 1.229(e). The parties may defer filing requests for admission of fact and genuineness of documents until up to 20 days after an opposing party's documents are produced and that party's deposition has been concluded.

Added Issues and Forfeitures

8. Petitions to add new issues must comply strictly with the standards and quality of proof required under the Commission's rule. 47 C.F.R. §1.229(d). See Great Lakes Broadcasting, Inc., 6 F.C.C. Rcd 4331, Comm'n Slip

engage in a free exchange of information about such matters without unnecessary delay. Cf. Raveesh K. Kumra, 5 F.C.C. Rcd 5607 (Review Bd 1990) (privilege to be confined strictly within the narrowest possible limits) and WWOR-TV Inc., 5 F.C.C. 6261, 6263 (1990) (Comm'n denied protection for documents on terms and conditions of employment or employment purposes).

Op. FCC 91-198, released July 16, 1991 (strive adherence to standards of §1.229 required). Petitions for new issues must also include a request for relevant documents and, except for non-party discovery, all discovery relating to any added issues must be completed within 30 days of the Presiding Judge's rulings adding the issues and permitting discovery. ⁴ 47 C.F.R. §1.229(e).

9. Where the new issues involve allegations that an applicant has made misrepresentations to the Commission or engaged in other misconduct during the pending application's process, the petition to enlarge issues must address, with particularity, the standards for forfeiture, shall specify the amount of forfeiture believed to be applicable, and shall state reasons for the forfeiture remedy and the recommended amount. See 47 C.F.R. §1.229(f). See also 47 U.S.C. §503(b)(2)(A). ⁵ The parties are reminded that an added forfeiture issue remains with the case even after settlement. 47 C.F.R. §1.80(g).

Procedural Dates

The following procedural dates are set to comply with the reformed time limitations and therefore these dates are firm:

- July 28, 1992 - Preliminary engineering data submitted to Bureau Counsel.
- August 25, 1992 - Discovery is closed. 47 C.F.R. §1.311(c)-(1).
- September 1, 1992 - Exchange and receipt by 3:00 p.m. (D.C. time) of all documentary exhibits (to include the exchanged SIS) and signed frozen sworn testimony.
- September 8, 1992 - Exchange and receipt by 3:00 p.m. (D.C. time) of witnesses requested for cross-examination stating reasons and legal precedent for each witness.

⁴ Depositions in connection with added issues must be noticed within 5 days after documents are produced. If subpoenas are needed and the 21 day notice provision applies, there should be relief sought from the 30 day discovery cut-off as contemplated by the rule and the additional time needed must be specified, including a cut-off date.

⁵ There must be a nexus shown between the alleged misrepresentation or misconduct with an applicable Commission rule. See, e.g., 47 C.F.R. §1.17 (duty to submit truthful written statements and responses to Commission inquiries and correspondence) and 47 C.F.R. §73.1015 (applicants shall not submit to the Commission any written statement containing a misrepresentation or material omission bearing on any matter within the Commission's jurisdiction).

- September 11, 1992** - Exchange and receipt by 3:00 p.m. (D.C. time) of oppositions to witness requests.
- September 22, 1992** - Admissions session to commence at 9:30 a.m. in a Commission courtroom to receive written cases and to rule on the scope of cross-examination.
- September 25, 1992** - Final Joint Engineering Exhibit or Stipulation accompanied with an engineer's affidavit which negates the comparative coverage issue shall be submitted to the Presiding Judge.
- September 29, 1992** - Commencement of hearing at 10:00 a.m. in a Commission courtroom in Washington, D.C.

Exhibit Assembly

Exhibits are to be assembled with each exhibit bearing a number and with a tab on each document. The exhibits are to be serially numbered, starting with the number 1. A prefix is to be used to indicate the party sponsoring the exhibits. Each exhibit should be separately and consecutively paginated. If stipulations are entered into, they are to be executed by counsel, prepared as joint exhibits, tabbed and paginated.

Commission Filings

Parties are to have sufficient copies of excerpts of any Commission filings which are expected to be used on cross-examination so that copies can be distributed immediately to opposing counsel and the Presiding Judge. While official notice may be relied on as a ground for the admission of Commission file records, official notice shall not be permitted as a substitute for the actual introduction of copies of documents that are used for cross-examination which must be properly marked and received in evidence.

Use of Depositions

Excerpts of deposition transcripts to be used on cross-examination must be available for distribution to counsel and the Judge at the time the witness takes the stand to testify and only after proper marking of the excerpts and their identification as an exhibit. Alternatively, the witness or counsel may read into the record the relevant Qs and As that are relied on to refresh recollection or to show an inconsistency. Counsel are reminded that a proper foundation must be made for use of depositions on cross-examination and a copy of the transcript must be furnished to the Presiding Judge before the examination of the witness begins.

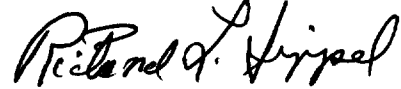
Extensions Of Time

Extensions of time with respect to discovery shall not be granted unless there is a clear showing of good cause and provided the request is made in advance of the due date. See 47 C.F.R. §1.46(a) (it is the policy of the

Commission that extensions of time shall not be routinely granted). See also Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases, 6 F.C.C. Rcd 157, 172 n. 34 (1992) (requests for extensions of time in comparative cases to be closely examined for clear showing of good cause). ⁶

SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION



Richard L. Sippel
Administrative Law Judge

⁶ The parties are on notice that failures to comply with procedural and discovery orders of the presiding trial judge may result in dismissal. See Hillebrand Broadcasting, Inc., 1 F.C.C. Rcd 419 (1986); Tri-State Communications, 4 F.C.C. Rcd 8258 (Review Bd 1989). See also Warren Price Communications, Inc., 4 F.C.C. Rcd 1992 (1989).